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or Utilities Commission.⁹ It seems to the present writer that a prohibition proceeding, the purpose of which was to determine whether a lower judicial tribunal had power to adjudicate a given controversy, could not without confusion have been perverted to the totally different purpose of bringing before the Supreme Court of the state an entirely distinct question, viz., whether the city council or the Utilities Commission had the rate-fixing power. In that question the Court of Common Pleas, against which the writ of prohibition was asked, had no interest unless it had jurisdiction to pass upon it—as indeed the majority decided it had. If—as the dissenting judge claimed—the Common Pleas had no power to adjudicate that question, the writ should issue, but there the prohibition proceeding ought to come to an end. However desirable it was to get the important matter of the location of the rate-fixing power before the court of last resort as quickly as possible, it is difficult to see how anything but confusion could or would result from using a writ of prohibition for that purpose.

W. W. C.

COMPETITION OF TROLLEYS AND UNLICENSED JITNEYS

The rapid spread of the jitney—the automobile passenger carrier—within the last few years has necessitated the regulation of the jitney business. It is now usual to require that the “jitneur,” under pain of fine or imprisonment, procure a license before he commences business. Many states also have the requirement that he furnish a surety company bond conditioned for the payment of all damages for personal injuries caused by him.¹ Such regulations are obviously intended, primarily, to benefit the public which uses the highway and not the trolley company, to whom the jitney has proven a most serious competitor. May the trolley company take advantage of such penal provisions to prevent the operation of unlicensed jitneys? The case of *Puget Sound Traction Light & Power Company v. Grassmayer* (1918, Wash.) 173 Pac. 504 holds that it may do so by injunction.²

It would be idle to assert that penal statutes do not affect the rights,

⁹ Apparently the Utilities Commission was not a party to the injunction proceeding. If not, it would, under the usual rules as to parties, not be a party to the prohibition proceeding. In that the only parties would be the Court of Common Pleas and the parties to the injunction proceeding, the hearing of which it was sought to prohibit.

¹ Cases dealing with such regulations are collected in L. R. A. 1915F 840; L. R. A. 1916B 1156; L. R. A. 1918B 912; and Ann. Cas. 1917C 1051.

² For complete statement of facts, see Recent Case Notes, *infra*. This case is in accord with *Memphis St. Ry. Co. v. Rapid Transit Co.* (1915) 133 Tenn. 99, 179 S. W. 635, L. R. A. 1916B 1143, Ann. Cas. 1917C 1045.

privileges, powers and immunities of the individual. One reason for being a citizen of a country is to obtain that country's protection against the marauder and the criminal. Yet because the individual may register his complaint of a breach of a penal statute with the proper prosecutor, it does not follow that he himself may rush into court for civil relief. It is always necessary to guard against the busybody.³ This is well done under ordinary principles of equity. Equity has no criminal jurisdiction, and unless there is special and pecuniary damage to the individual, equity will not interfere to enforce a valid penal statute,⁴ nor to prevent the enforcement of an invalid penal statute.⁵ Yet the exception is well recognized and equity will not stop in the enforcement of personal and property rights simply because a crime is involved.⁶ The enforcement of penal provisions is not a ground of equity jurisdiction, but may be incidental to some recognized ground of such jurisdiction.

The *Grassmayer* case accordingly bases on two grounds its decision that the trolley company may obtain an injunction prohibiting jitney operation by those who have not furnished bonds in compliance with state law: (1) that since defendants were carrying on business illegally, they were maintaining a public nuisance and might, therefore, be enjoined by any one suffering special injury thereby; and (2) that defendants' operation of an illegal business was a violation of plaintiff's franchise. The first ground is an extension to the situation before the court of the general rule of the common law that where a given state of facts constitutes a public nuisance a civil action for damages or for an injunction may be brought by any private person who suffers from it "special and particular damage which is not experienced in common with other citizens."⁷ This principle is

³ In Connecticut there was a statute requiring an administrator in default in filing an inventory to forfeit \$20 a month to anyone suing therefor. This penalty was recovered in *Atwood v. Lockwood* (1904) 76 Conn. 555, 57 Atl. 279, whereupon plaintiff instituted so many suits that the Legislature was forced to repeal the statute. See *Atwood v. Buckingham* (1905) 78 Conn. 423, 62 Atl. 616.

⁴ See *Tiede v. Schneidt* (1898) 99 Wis. 201, 74 N. W. 798 and authorities cited in note 6, *infra*.

⁵ *Denton v. McDonald* (1911) 104 Tex. 206, 135 S. W. 1148, 34 L. R. A. (N. S.) 453 with note; *Hall v. Dunn* (1908) 52 Ore. 475, 97 Pac. 811, 25 L. R. A. (N. S.) 193. The Washington cases are *contra*, however. *City Cab etc. Co. v. Hayden* (1913) 73 Wash. 24, 131 Pac. 472, L. R. A. 1915F 726, Ann. Cas. 1914D 731; *Huntworth v. Tanner* (1915) 87 Wash. 670, 152 Pac. 523, Ann. Cas. 1917D 676.

⁶ *Re Debs* (1894) 158 U. S. 564, 593, 15 Sup. Ct. 900; *Vegelahn v. Guntner* (1896) 167 Mass. 92, 44 N. E. 1077; *Hamilton Brown Shoe Co. v. Lally* (1895) 131 Mo. 212, 32 S. W. 1106; *Pomeroy, Equitable Remedies*, sec. 476.

⁷ *Cranford v. Tirrell* (1891) 128 N. Y. 341, 28 N. E. 514; *Burdick, Torts* (3d ed.) 464.

reaffirmed by the Washington statutes.⁸ To be applicable it requires a holding that the operation of an unlicensed jitney is a public nuisance. As the "jitneur" operating without a license is using the public highways for purposes not sanctioned by the law, so to hold seems not an undue extension of the rules as to public nuisances upon highways.⁹

The other ground given for the decision seems really to assume the answer to the question at issue rather than to furnish a reason upon which an argument can be based. To say that the defendant's operation of an illegal business is a violation of the plaintiff's franchise is merely to assert in general rather than specific terms that the defendant is violating a right of the plaintiff's—but that is the thing to be proved. Granted that, as the court said, "the franchise is property and any unlawful interference therewith is actionable," we still need to know just what this so-called "property" is and how it can be "interfered with," lawfully or unlawfully. It is obvious that in calling the franchise "property" the court did not use the term to indicate a physical object, as the "interference" by the defendant did not include any acts done upon the plaintiff's tracks. Upon analysis the "franchise" of the plaintiff to lay tracks, operate trolley cars, etc., upon the public highways is seen to be a complex aggregate of jural relations¹⁰ consisting, *inter alia*, of: (1) privileges against people generally to do these things;¹¹ (2) rights against people generally¹² that they shall not interfere with the doing of these things.¹³ Not being an "exclusive franchise" it does not include rights that other duly licensed persons shall refrain from doing similar things, or an immunity from having similar franchises granted to other persons by the state. The real question, therefore, is, whether such a "franchise" ought to be held to include rights against unlicensed persons that they refrain from competing with the plaintiff. Ultimately this question must be decided on grounds of policy which the use of vague language can only serve to conceal.

Within certain limits the problem is similar to that which arises

⁸ Rem. Code, secs. 943, 944, 8316.

⁹ Cf. *Commonwealth v. Allen* (1892) 148 Pa. St. 358; also cases holding that if a public nuisance unreasonably diverts custom from plaintiff's place of business, he may sue. *Flynn v. Taylor* (1891) 127 N. Y. 596, 28 N. E. 418; *Burdick, op. cit.*, 465.

¹⁰ The word "franchise" at times is used to denote the operative facts—the grant by the state—and to connote the resulting jural relations. As used in the text it denotes the jural relations resulting from the grant.

¹¹ "Multital," rather than "paucital," according to the terminology of the late Professor Hohfeld. *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1917) 26 YALE LAW JOURNAL, 710, 718.

¹² "Multital" rights, therefore, commonly called rights *in rem*.

¹³ Except, of course, upon some privileged occasion.

when an easement or a profit *à prendre* is granted. Such a grant confers upon the grantee a complex aggregate of jural relations. As against the general owner of the property in question the grantee acquires privileges to enter upon the land and do certain acts thereon, as well as rights against the owner that he shall refrain from interfering with the doing of the privileged acts. Does the law also confer upon the grantee rights against third persons that they shall refrain from acts which will prevent or interfere with the doing of the privileged acts? The instrument granting the easement or profit is of course silent upon the question. It remains for the law to attach to the grant such jural relations as sound policy indicates. There is authority for the proposition that the resulting easement or profit does include the suggested rights against third persons.¹⁴ The analogy to the case in hand is strikingly close if we assume that the grantor of the easement or profit reserves the privilege and power of granting similar rights, etc., to others, i. e., that the easement or profit is not "exclusive."¹⁵

On the whole, considerations of policy seem to the present writer to be in favor of the result reached by the court in the principal case. It is desirable that public utilities be operated efficiently. This is hardly to be expected if they are exposed to unlimited competition with irresponsible persons. To permit them to bring suits to prevent such competition, as well as to permit a representative of the public to institute criminal prosecutions or (in some jurisdictions) injunction proceedings, seems therefore a sound rule. And a similar result was reached in *Farmers' & Merchants' Co-op. Tel. Co. v. Boswell Tel. Co.* (1918, Ind.) 119 N. E. 513, in which an injunction was granted at the instance of a licensed telephone company, whose franchise was not exclusive, against an unlicensed company. In that case the unlawful construction by the defendant of poles and lines on the public highway even more clearly constituted a public nuisance.

ADVERSE POSSESSION BY TRUSTEE UNDER TRUST VOID AS A
PERPETUITY: DOES IT ENURE TO SUPPOSED
CESTUI BY ESTOPPEL?

An interesting problem which is somewhat unique in legal history, is presented by a case which has come three times before the Maryland Court of Appeals and now awaits solution on the fourth appeal.

¹⁴ *Wilson v. Mackreth* (1766) 3 Burr. 1824; *Fitzgerald v. Firbank* [1897] 2 Ch. 96.

¹⁵ The language in the easement and profit cases suggests the possibility that if the grant were not exclusive it would confer what is commonly called a mere "license" and that therefore the grantee would not acquire these rights against third persons. Cf., however, Hohfeld, *Faulty Analysis in Easement and License Cases* (1917) 27 YALE LAW JOURNAL, 66, 92-99.